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Supreme Court, U.S.
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No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the Department of Labor's "Interpretation" of the Fair Labor Standards Act, codified at 29 C.F.R. § 552.109(a), providing that employees who are employed in domestic service employment to provide companionship services, but who are employed by entities other than the individual, family or household using their services, are exempt from the Act's minimum wage and overtime requirements under the Act's companionship exemption, 29 U.S.C. § 213(a)(15), entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

2. Granting 29 C.F.R. § 552.109(a) the deference it is due under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944), should the federal courts apply the Department of Labor's interpretation of the Fair Labor Standards Act's companionship exemption, 29 U.S.C. § 213(a)(15), embodied in the regulation?

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STATEMENT OF THE CASE

Petitioners failed to file a brief in the Court of Appeals prior to the Court's original decision.

Both decisions below, written by Chief Judge Walker, were unanimous and no judge on the Court of Appeals requested that a vote be taken on the petition for rehearing *en banc*. la-6a, 7a-32a; Pet., No. 04-1315, 31a-32a.

ARGUMENTS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS

Petitioners do not actually argue there is a split in the Circuits created by the Tenth Circuit in *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004), and *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2001), *cert. denied*, 531 U.S. 1072 (2001).[1] Petitioners' reluctance to argue there is a split is well founded for three reasons.[2]

First, in both its decisions, the Tenth Circuit's discussion of the issue of whether 29 C.F.R. § 552.109(a) (the third-party employer regulation) should be followed is *dicta*. In *Johnston*, the Tenth Circuit held that the employees at issue were not employed in a "private home" under 29 C.F.R. § 552.3, thus, were not engaged in "domestic service employment," and, therefore, did not fall within the companionship exemption. 213 F.3d at 562-66. The Court's cursory discussion of whether employees of a third-party

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[1] Even if there were an actual split among the Circuits, the need for uniformity in this area is substantially diminished by the fact that parallel state wage and hour laws exist which are *not* uniform in their treatment of companions. *See infra* at 5.

[2] In fact, on the first question posed by Petitioners—whether Department of Labor (DOL) interpretations of statutory exemptions to the Fair Labor Standards Act (FLSA)—all of which are embodied in regulations—are entitled to *Chevron* deference, the courts of appeal are in complete harmony. *See infra* at 15.

employer *could* fall within the companionship exemption *if* they were employed in a private home is therefore *dicta*. The question of whether the employees were employed in a private home was also the only question at issue in *Welding*: "Whether Bios is exempt from paying overtime to any of the plaintiffs here depends on whether any of the residences in which plaintiffs provided services to developmentally disabled individual should be considered 'private homes.'" 353 F.3d at 1218. It does not appear from the decision that the employees even argued that the exemption did not apply because their employer was a third party. *See id.* at 1217 n.3.

Second, as the Second Circuit noted, the Tenth Circuit's *Johnston* holding predates this Court's holding in *United States v. Mead Corp.*, 533 U.S. 218 (2001). 25a. Petitioners note that *Welding* post-dates *Mead*, but the later decision relies solely on *Johnston* to support its *dicta*, 353 F.3d at 1217 n.3, not even citing *Mead*. The Second Circuit followed *Mead in* denying the regulation *Chevron* deference. For this reason too, the decisions do not conflict.

Finally, the Tenth Circuit holdings in no way present this Court with the type of fully analyzed and considered conflict among circuits that is a precondition of review. *Johnston* merely contains conclusions devoid of analysis. *In full*, the Tenth Circuit's holding states the following concerning the questions at issue:

> In § 213(a)(15), Congress expressly left it to the Secretary of Labor to define and delimit the terms in the statute by regulation. The Supreme Court has instructed that courts must defer to a federal agency's interpretation of a statute unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron* . . . . The contention that the exception does not apply to domestic services employees who are not employed directly by an individual in need of care, or his or her family has been rejected by the courts that

> have been confronted with the same question. . . [3]We are persuaded that the secretary's interpretation is not arbitrary, capricious, or manifestly contrary to § 213(a)(15).

213 F.3d at 562. *Welding,* in turn, merely cites *Johnston. See* 353 F.3d at 1217 n.3. Thus, the Second Circuit was (and still is) correct when it observed "that none of these prior cases carefully considered the question before us now." 25a.

Permitting further circuit court adjudication in this area would be prudent because, contrary to Petitioners' assertion that the Second Circuit's decision disrupts 30 years of employer reliance on the regulation, the issue is actually of recent vintage because the homecare industry is of recent vintage. As the DOL explained in proposing revisions to the companionship regulations in 2001, "[t]he home care industry has changed dramatically since the Department published the 1975 regulations." 66 Fed. Reg. 5483 (Jan. 19, 2001). The combination of a growing demand for long-term care, consumer preference for and social policy in favor of in-home care, and expanded Medicaid and Medicare coverage of such care has led to dramatic, *recent* growth in the number of third-party agencies employing homecare workers and the number of such workers (which tripled between 1988 and

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[3] The Tenth Circuit here cited footnotes in two District Court decisions, *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299 n.2 (N.D.Okla. 1998), and *Madison v. Resources for Human Development, Inc.*, 39 F.Supp.2d 542, 545 n.3 (E.D.Pa. 1999), *vacated on other grounds*, 233 F.3d 175 (3d Cir. 2000). In *Terwilliger*, it does not appear that the plaintiff argued that the regulation was not entitled to *Chevron* deference or that it was invalid. Similarly, the footnote in *Madison* does not suggest that the validity of the regulation was even at issue. The Court simply cites the regulation and states that the fact that the plaintiffs are employed by a third party "does not exclude them from the exemption." 39 F.Supp.2d at 545 n.3. Moreover, as in *Johnston*, the statement is *dicta* as the Court held that the employees were not exempt because they did not work in a private home. *Id.* at 545-48.

1998). *Id.* Thus, the question addressed by the Second Circuit has, as a practical matter, only arisen in the last few years and other courts of appeal should be given an opportunity to consider it before this Court determines whether review is necessary.[4]

II. THIS CASE DOES NOT RAISE ISSUES OF EXCEPTIONAL IMPORTANCE

Petitioners argue that this case is of exceptional importance because it would be expensive for third-party employers of unskilled workers,[5] performing often physically and emotionally demanding work for elderly and disabled people in their homes, heavily subsidized by federal and state government, to comply with the minimum labor standards Congress established in the FLSA. In 1937, however, President Roosevelt explained that embodied in the Act "are a few rudimentary standards of which we may properly ask general and widespread observance." S. REP. NO. 884, 75th Cong., 1st Sess. 3 (1937). "Failure to observe them," Roosevelt continued, "must be regarded as socially and economically oppressive and unwarranted under almost any circumstances." *Id.* While the FLSA contains a limited number of specific exemptions, additional payroll costs cannot be a reason for broadly construing them because Congress obviously understood that compliance with the Act would cost employers money and yet this Court has repeatedly held that the Act's exemptions must "be narrowly construed." *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Nevertheless, Petitioners and their amici argue that this Court

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[4] The question is currently pending before both the Eleventh and Fifth Circuits in *Florida Habilitation Network, Inc. v. Buckner*, No. 06-11032-EE (11th Cir.) (argued November 6, 2006); *Fernandez v. Elder Care Option, Inc.*, No. 05-16806-A (11th Cir.) (stayed pending a decision in *Buckner*); and *Cook v. Hayes*, No. 06-30856 (5th Cir.)

[5] Petitioner Long Island Care at Home, for example, employs approximately 40 homecare (and possibly other) workers. 84a ¶ 2.

should grant review because, if third-party employers are required to comply with the FLSA, they will seek to avoid increased costs by reducing workers' hours, thereby harming the aged and disabled people cared for by the workers. The Court should reject this argument for five reasons.

First, the experience under state wage and hour laws covering companions[6] belies predictions of "serious dislocation of care" advanced by Petitioners and their amici. Pet. at 13. Many states require third-party employers of companions to pay minimum wages and premium pay for overtime. *See, e.g.*, 7 Colo. Code Regs. § 1103-1(5); 820 Ill. Comp. Stat. 105/3(d) and 111. Admin. Code tit. 56, § 210.100; Kan. Stat. § 44-1202(e)(2) and Kan. Admin. Regs § 49-30-1(h); Mich. Comp. Laws § 408.394(14)(2)(a); Minn. Stat. § 177.23(11); Mont. Code § 39-3-406; Nev. Rev. Stat. §§ 608.018(3)(a), .250(2)(b); Pa. Stat. tit. 43, § 333.105(a)(2) and 34 Pa. Code § 231.1(b); Wash. Rev. Code § 49.010(5)(b); Wis. Admin. Code § 274.015. Indeed, because the states' power to regulate economic relations not touching interstate commerce is not limited by the commerce clause (unlike federal power), many state wage and hour laws do not treat domestic service differently than other employment and thus contain no companionship exemption. *See, e.g.* Mass. Gen. Laws ch. 151, §§ 1-3 and Opinion Letter MW-2002-020, Mass. Dept. of Labor, Div. of Occupational Safety, available at www.mass.gov/dos/mw_docs/mw-2002-020.htm (July 19, 2002); N.J. Stat. § 34:11-56a4; W.Va. Code §§ 21-5C-1 *et seq.* It simply cannot be the case that employers in Illinois, Colorado and elsewhere can pay companions a minimum wage and premium pay for overtime while in New York respecting such minimum standards "threaten[s] a serious dislocation of care." In fact, even in New York, while state law incorporates FLSA exemptions, exempt employees must

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[6] The FLSA expressly does not preempt more inclusive or protective state laws. *See* 29 U.S.C. § 218(a).

still be paid one and one-half times the minimum wage[7] for overtime. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2. There is no evidence that these state law requirements—which parallel requirements under the Second Circuit's decision—have disrupted homecare delivery or placed homecare outside the financial reach of any consumers.

Second, provision of companionship services, specifically those provided by Petitioners, is heavily subsidized by federal and state governments under Medicaid and other programs,[8] and these governments can and, in some cases, must adjust reimbursement rates to enable providers to comply with the FLSA. New York, for example, provides that a factor to be considered in setting personal care services[9] payment rates under Medicaid is "the applicable minimum wage laws." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(6)(ii)(d). If there is a change in the applicable wage and hour law or its construction, reimbursement rates must be adjusted to compensate for resulting increases in costs. New York specifically permits providers to request revision of reimbursement rates when the provider "has incurred new or unanticipated costs for programs or services mandated or approved by the department and . . . the cost report that the provider submitted to the department does not reflect the provider's actual costs for reasons beyond the provider's control." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(7)(iii)(c)(2).[10] In fact, the President of the New York State Association of Health

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[7] Which is higher than the federal minimum wage. *Compare id.* § 142-2.1(a) (3), (4) ($6.75 after January 1, 2006, $7.15 after January 1, 2007) *with* 29 U.S.C. § 206(a)(1) ($5.15).

[8] *See* 85a ¶ 5, 89a ¶ 7, 93a ¶2, 103a-104a ¶ 2.

[9] That is the program referenced in Petitioners' declarations. *See* 89a, 93a, 95a.

[10] None of the declarations state that this mechanism has been invoked without success after the Second Circuit's original decision on July 22, 2004.

Care Providers acknowledges that rates can "be adjusted to accommodate the higher overtime costs." Pet., No. 04-1315, 129a, ¶ 17.[11]

Third, the factual basis for this argument is not properly before this Court. Petitioners cite assertions contained in declarations filed with the Court of Appeals in support of Petitioners' Motion to Stay the Mandate and in amicus briefs, but no court has found those assertions to be true.

Moreover, Petitioners' central factual assertion—that complying with the FLSA's overtime provision will dramatically increase the cost of services—is, at best, highly exaggerated. The DOL, relying on data from the Bureau of Labor Statistics and the Department of Health and Human Services (HHS), determined in 2001 that affording minimum wage and overtime protection to homecare workers would "not produce a significant economic or budgetary impact on affected entities." 66 Fed. Reg. 5486 (Jan. 19, 2001). This conclusion was based on the facts that "more than 90 percent of the workers employed in the potentially affected occupational categories already receive the current federal minimum wage of $5.15 an hour or higher" and "most of the workers . . . do not regularly work overtime (*i.e.*, more than 40 hours per week)." *Id.* DOL specifically found that "there would be little impact from overtime wage costs if [the employees'] status was changed from exempt to non-exempt." *Id.* This finding comports with HHS funded research which points out that most states limit the number of hours of personal care services that they will fund under Medicaid and that the average limit is 4.8 hours per day. Leblanc, Tonner, and Harrington, *State Medicaid Programs Offering Personal Care Services*, 22 HEALTH CARE FINANCING REV. 155,

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[11] In regard to backpay, if the Petitioners and other employers relied in good faith on the regulation, the FLSA itself provides a defense against liability. *See* 29 U.S.C. § 259(a).

162 (2001). New York, for example, places strict limits on the number of hours of personal care services available under Medicaid, permitting a maximum of 28 hours per week absent unusual circumstances. *See* N.Y. Comp. Codes R. & Regs. tit. 18, §§ 505.14(a)(6)(i)(b), 505.14(a)(6)(ii)(b), and 505.14(a)(6)(iii)(c). Thus, the "shifting array of caregivers" Petitioners assert will be necessary to avoid overtime obligations (Pet. at 15) will not, in fact, be necessary because the vast majority of consumers nation-wide receive less than 40 hours of care per week.

Fourth, the greatest threat to the availability and quality of companionship services is not that third-party employers will be required to comply with minimum compensation standards, but rather that they will not do so and thereby further aggravate a growing shortage of homecare workers. There is already a "severe shortage" of workers and a 70% annual turn-over rate, *see* Nat'l Conference of State Legislatures, *Better Jobs Better Care: Retaining Long-Term Care Workers, 25* STATE HEALTH NOTES No. 418 at 1 (April 19, 2004), and the percentage of the population over 65 (those most in need of companionship services) is expected to double in the next 25 years. *See* Census Bureau, *65+ in the United States: 2005* at 1 (Dec. 2005). Correspondingly, home health aide is expected to be the fastest growing occupational category in the next decade. Bureau of Labor Statistics, *Occupational Employment Projections to 2014,* MONTHLY LABOR REV. 70, 75 (Nov. 2005). "The increase in demand will be occurring at a time when the supply of workers who have traditionally filled these jobs is expected to increase only slightly." HHS, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation: Report to Congress* v (May 14, 2003). The result is "apparent"—"workforce supply will become increasingly problematic." Center for California Health Workforce Studies, University of California, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for*

Geriatric Care Workers 34 (Feb. 2006). The laws of supply and demand will force Petitioners and other providers to comply with the FLSA's minimum standards and, if they do not, the resulting shortage of workers will have a much more serious adverse impact on the provision of needed care than that conjured up by Petitioners and their amici.[12]

Finally, Petitioners' argument could be made in every case involving judicial construction of a federal law with financial consequences for a class of people or entities. Every case construing police and fire exemptions to the FLSA (29 U.S.C. § 207(k)), for example, affects the finances of police and fire departments across the nation and, thus, their ability to provide essential services. But this Court cannot review every such case and, therefore, this Court has never viewed the financial impact of a decision as sufficient reason for granting review.

This case does not raise issues of exceptional importance.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

A. The Court of Appeals' Decision is Consistent with This Court's Decision in Mead

In *Mead*, this Court reaffirmed the principle that "judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*." 533 U.S. at 311. Petitioners, therefore, do not dispute the distinction drawn by the Second Circuit between types of administrative action. Rather, Petitioners argue that the Second Circuit's classi-

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[12] It was for this reason, that the AARP, the largest association of consumers of companionship services in the country, filed a brief in support of the Plaintiff when this case was remanded to the Second Circuit. *See* Brief of Amicus Curiae AARP, *Coke v. Long Island Care at Home, Inc.*, No. 03-7666 (2d Cir.)

fication of the third-party employer regulation as the type of action entitled only to *Skidmore* deference conflicts with this Court's decisions. Yet, Petitioners do not point to any specific conflict and none exists.

1. The Second Circuit's holding that the third-party employer regulation is an interpretation not entitled to *Chevron* deference was expressly based on *Mead*. *Mead* holds that in order for agency action to qualify for *Chevron* deference, (1) Congress must delegate law making authority to the agency and (2) the agency action must be pursuant to that delegation. This Court held that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. The Second Circuit expressly based its holding on the second prong of the test,[13] "*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless 'it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" 26a (quoting *Mead*, 533 U.S. at 226-27). Pursuant to the quoted language from *Mead*, the Second Circuit correctly held that the

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[13] Scholars have described *Mead's* second prong as follows: "in *Mead* the Court made clear that it is only when the agency actually employs its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1196 *(2004)*. Indeed, even prior to *Mead*, scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its contemporaneous description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose at the time it made the choice.

Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389 (1985).

regulation "does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority." 26a. The Second Circuit's decision is consistent with *Mead*.

2. Petitioners argue that *Chevron* deference is always owed agency interpretations embodied in regulations adopted after notice and comment, while admitting *Mead* held no such thing. If that was this Court's intent, however, it could easily have said so in *Mead*. *Mead* states that issuing a regulation, even by notice and comment rulemaking, is not determinative of the degree of deference owed. 533 U.S. at 230-31. This Court explained, "interpretive *rules* . . . enjoy no *Chevron* status as a class." *Id.* at 232 (emphasis added). As this Court pointed out in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), much of the "discussion . . . [in *Mead*] would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive."

No Justice of this Court and no court of appeals has ever suggested that a regulation adopted after notice and comment is always entitled to *Chevron* deference, even when the agency clearly indicated at the time of adoption that it was not invoking its "delegate[d] general authority to make rules with force of law." Surely an agency can choose both to adopt an interpretation without exercising its delegated authority to "make rules with force of law" (in order, for example, to permit greater leeway for judicial construction), and to do so after notice and comment.[14]

Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 125 S.Ct. 2688 (2005), did not involve this situation, but rather the question of whether *Chevron* deference was "foreclosed by the conflicting [earlier] construction of the [FCC] Act" by the Court of

[14] "It is within an agency's discretion to afford parties more procedure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 312-13 (1979).

Appeals. *Id.* at 2700. Nor did the colloquy between Justices Breyer and Scalia in that case address this situation. *See id.* at 2712-13, 2718-19. While Justice Scalia reads *Mead* to hold that "some unspecified degree of formal process was required - or was at least the only safe harbor," *id.* at 2718-19, he does not suggest that agencies are barred from expressly declining to exercise their delegated authority if they adopt a regulation after notice and comment.

Similarly, none of the court of appeals' decisions cited by Petitioners (Pet. at 11, 19-20) so hold. None of the decisions contain any analysis of *Mead's* second prong. In fact, *Chevron* deference was not even contested in any of the cited cases except *Alaska Department of Health and Social Services v. Centers for Medicare and Medicaid Services,* 424 F.3d 931 (9th Cir. 2005), and in that case it was *Mead's* first prong that was at issue as the Court cited "the formal administrative process afforded" a state after disapproval of amendments to its Medicaid state plan as evidence that "Congress intended" to delegate law-making authority to the Administrator. *Id.* at 939. Petitioners read too much into the uncontested restatements of *Mead's* standards in the cited cases.

Finally, even if this Court were to hold that the use of notice and comment procedure is determinative (regardless of the agency's contemporaneous intention), the Second Circuit found that the DOL's compliance with the APA's notice and comment requirements "was at best idiosyncratic and at worst insufficient" when it promulgated the third-party employer regulation. *24a. See infra* at 29. And *Chrysler* holds that "a procedural defect in the . . . regulations [—"lack of strict compliance with the APA"—]. . . precludes courts from affording them the force and effect of law." 441 U.S. at 312.

Both because the DOL expressly indicated that it was not exercising its delegated power "to make rules with force of law" when it adopted the third-party employer regulation and because the DOL's compliance with the APA was "at best

idiosyncratic," this case is not an appropriate vehicle for considering the change in the law proposed by Petitioners.

3. Petitioners' second argument is that the Second Circuit erred in applying *Mead* because the DOL intended to exercise its delegated authority when it promulgated the regulation. This is not grounds for Supreme Court review, however, as Supreme Court Rule 10 provides that "[a] writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Moreover, the Petitioners are factually wrong. The regulatory record makes clear that the DOL made a conscious choice not to exercise its delegated authority to "make rules with force of law." In 1975, when the third-party regulation was promulgated, the DOL was well aware of the distinction between substantive and interpretive regulations as well as the different degrees of deference they were accorded and the DOL knowingly and intentionally characterized the third-party employer regulation as an interpretation.[15] The distinction is embodied in the Administrative Procedures Act, 5 U.S.C. § 553(b)(3)(A) and (d)(2), adopted in 1946. The Attorney General's 1947 *Manual on the Administrative Procedure Act* made clear that only substantive rules "have the force and effect of law." *See Chrysler*, 441 U.S. at 302 n.31 (quoting *Manual* at 30 n.3). In fact, the DOL has since 1947 defined the term "interpretation" "to describe a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of

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[15] Petitioners argue that "interpretations" may satisfy *Mead's* test and thus be entitled to *Chevron* deference. While the application of *Mead* does not turn on labels, here the DOL's categorization of the third-party regulation among its "interpretations" in contrast to its "general regulations" is strong evidence that the agency did not intend to exercise its "delegated . . . authority to make rules with the force of law" for the reasons explained *infra* at 13-15.

applicable statutory language.'" 29 C.F.R. § 790.17(c). *See 29* C.F.R. Part 790 ("Source: 12 FR 7655 (Nov. 18, 1947)").

With this knowledge and express adoption of administrative law principles, DOL has, since 1949, divided its FLSA regulations into "general regulations" and "interpretations." For example, the Act's three primary exemptions are for executive, professional and administrative employees. *See* 29 U.S.C. § 213(a)(1). Since 1949, DOL has classified regulations under these exemptions as "general regulations" and "interpretations." *See* 14 Fed. Reg. 7705, Subpart A—General Regulations (Dec. 24, 1949); 14 Fed. Reg. 7730, Subpart B—Interpretations (Dec. 28, 1949); 29 C.F.R. Part 541, Subpart A—General Regulations, Subpart B—Interpretations (2004).[16]

Following this pattern, the regulations issued after the 1974 amendments were split into "General Regulations," issued pursuant to DOL's express authority to "define[] and delimit[]" the terms of the exemption, and "Interpretations." *See* 29 C.F.R. Part 552, Subparts A and B; 40 Fed. Reg. 7404, 7405, 7406 (Feb. 20, 1975). These regulations expressly state that "[t]he definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6"—*i.e. not* in § 552.109(a). 29 C.F.R. § 552.2(c). DOL classified its third-party employment regulation among its "Interpretations." *See* 29 C.F.R. Pt. 552, Subpart B, § 552.109(a). DOL's 1974 Notice of Proposed Rulemaking also clearly stated DOL's intention "to add a new 29 CFR Part 552 defining and delimiting, *in Subpart A,* the terms [used in the amendments] ..., and setting forth, *in Subpart B,* a statement of policy and

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[16] Acting after notice and comment, the DOL recently consolidated its general regulations and interpretations in Part 541, *see* 29 C.F.R. §§ 541.0 *et seq.*, in part, to "eliminate confusion regarding the appropriate level of deference to be given to the provisions." 68 Fed. Reg. 15563 (Mar. 31, 2003). Significantly, the Department has *not* taken similar action in respect to the regulations and interpretations in Part 552.

interpretation concerning the application of the Fair Labor Standards Act to domestic service employees." 39 Fed. Reg. 35382 (Oct. 1, 1974) (emphasis added). The language describing Subpart B—"a statement of policy and interpretation"—echoes *Mead's* description of "interpretations contained in policy statements" that are "beyond the *Chevron* pale." 533 U.S. at 234.[17] Thus, DOL's actions cannot be dismissed as meaningless labeling, but represent the agency's deliberate choice to specify which of its regulations were and were not adopted pursuant to its delegated law-making function. The Second Circuit thus correctly held that "the regulation at issue . . . is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15)." 26a.

The courts of appeal are in complete harmony in according the DOL's "interpretations" of the statutory exemptions only *Skidmore* deference. *See Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 642 (7th Cir. 1998); *Freeman v. Nat'l Broad. Co.*, 80 F.3d 78, 83 (2d Cir. 1996); *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.18 (3d Cir. 1994); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990). In fact, the Ninth Circuit, like the Second, cited *Mead* to support its holding that "these interpretive rules are not binding" and "enjoy no *Chevron* status." *Brigham v. Eugene Water & Electric Bd.*, 357 F.3d 931, 940 (9th Cir. 2004).[18]

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[17] In addition, the content of the regulations contained in Subpart B reflect the DOL's intention that they be used to guide administrative action, for example, § 552.100(c) and (d) announce what credits against the minimum wage "the Administrator will accept" for meals and lodging.

[18] Petitioners argue that this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), is to the contrary because it accorded *Chevron* deference to a regulation that was classified among the interpretations. But not only

Petitioners' arguments to the contrary are unconvincing. They argue that the DOL promulgated the entire set of regulations, including the third-party regulation, pursuant to its express statutory authority under § 13(a)(15), to define and delimit the terms of the exemption, and its general authority to issue regulations. But while these two statutory provisions are listed as authority for the entire set of final regulations promulgated in 40 Fed. Reg. 7404-07 (Feb. 20, 1975), *see id.* at 7405, DOL expressly indicated that the third-party regulation was not among those adopted pursuant to its authority to define and delimit the terms of the exemption. *See* 29 C.F.R. § 552.2(c); 39 Fed. Reg. 35382 (Oct. 1, 1974).[19] The citation to the general statutory authority to adopt regulations, 88 Stat. 76, § 29(b) (Apr. 8, 1974), also demonstrates nothing because an agency can promulgate either legal or interpretive regulations and here the DOL expressly categorized the third-party regulation as the latter. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C.Cir. 1993), is not to the contrary as there the Court did not refer to express reliance on a general grant of rule-making authority but rather to express reliance on statutory authority to adopt rules containing "mandatory health or safety standards." 30 U.S.C. § 811(a).

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was the degree of deference not at issue in *Auer*, *see id.* at 457; 65 F.3d 702 (8th Cir. 1995) (no discussion of *Chevron* or degree of deference), the regulation at issue, 29 C.F.R. § 541.118(a) (1996), defined a term used in the general regulations not in the Act, 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996) (each using the term "salary basis"), and was thus entitled to heightened deference as the agency's construction of its own regulation.

[19] Moreover, the notice does not state that the regulations were promulgated pursuant to the authority given DOL in § 13(a)(15) to "define[] and delimit[]" the exemption's terms, but merely cites the section as a whole. Obviously, "both legislative and interpretive rules frequently interpret the meaning of language in a statute" and thus cite the statute. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 384. Therefore, mere citation of a statute cannot render a rule legislative.

Petitioners also argue that the "nature of the rule" suggests it is legislative, citing *Chrysler*. But *Chrysler* was decided prior to *Mead* and *Chevron*, and did not involve the question of the degree of deference due agency regulations. Moreover, *Chrysler* cannot stand for the proposition asserted by Petitioners or it would reduce the category of agency actions not entitled to *Chevron* deference to a virtual null set and render the *Mead* test inoperable.[20] In fact, *Chrysler* makes clear that the fact "[t]hat an agency regulation is 'substantive' . . . does not by itself give it the 'force and effect of law.' *Id.* at 302. Rather, "the exercise of quasi-legislative authority by governmental departments . . . must be rooted in a grant of such power by the Congress." *Id.* Here, the Second Circuit correctly held that DOL did not "root" its actions in such a grant of power.

Petitioners' final argument is that the Second Circuit should have deferred to DOL's *ex post facto* characterization of the regulation in its December 2005 Advisory Memorandum. 50a-64a.[21] But the Second Circuit correctly did not accept DOL's untimely characterization for three reasons.

First, it is the DOL's contemporaneous classification of the regulation that is relevant under *Mead*, not its *post-hoc* reclassification in the Advisory Memorandum.[22] *Mead* holds that *Chevron* deference is not appropriate "where such

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[20] Far from being accepted by this Court, the test suggested by Petitioners had "been rejected by most courts" even prior to *Mead*. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 398.

[21] Petitioners do not argue that such deference is required in this regard because DOL construed its own regulation in the Advisory Memorandum and that is appropriate because the Memorandum does not in any way construe the terms of the regulation.

[22] In fact, the Memorandum does not characterize the *promulgation* of the regulation as an exercise of the DOL's delegated law-making authority, but merely states, "the Department has always treated the third part employment regulations as legally binding legislative rules." 64a.

authority [to adopt legislative rules] was not invoked." 533 U.S. at 237 (emphasis added). That is the determinative point under *Mead* and it cannot be altered by subsequent agency assertion. Scholars have described *Mead's* second prong as follows: "in *Mead* the Court made clear that it is only when the agency *actually employs* its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting, 73* FORDHAM L. REV. at 1196 (emphasis added). Indeed, even prior to *Mead,* scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its *contemporaneous* description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose *at the time it made the choice.*

Asimow, *Nonlegislative Rulemaking,* 1985 DUKE L.J. at 389 (emphasis added). In contrast, "[s]ubsequent characterization" of a regulation as legislative or interpretive should not be accorded deference. *Id.* at 390 n.40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but it would be "both unfair and disingenuous to allow the Secretary to say later that he didn't mean it. . . . [W]e are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")[23]

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[23] The cases cited by Petitioner are not to the contrary. *Am. Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000), involved the distinction between adjudication and rule making and a contemporaneous agency characterization of its action as a "Declaratory Order." *Id.* at 795. *Splane v. West,* 216 F.3d 1058, 1063 (Fed. Cir. 2000), also involved a contemporaneous characterization contained in the text of the subject interpretation itself. And *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 517 (1994), did not involve an agency's characterization of the nature of its prior action (as legislative or interpretive) at all, but rather an agency's substantive construction of its own regulation.

Second, in *Auer*, this Court made clear that "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack" is not entitled to deference. 519 U.S. at 462 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). That is exactly what the Advisory Memorandum is as demonstrated by the timing of its promulgation. On June 6, 2005, after the original petition for a writ of certiorari was filed in this case, this Court invited the Acting Solicitor General to file a brief. On December 1, 2005, the Department promulgated the Advisory Memorandum. On December 22, 2005, the Solicitor General filed the Brief of the United States, relying primarily on the Advisory Memorandum as grounds for remand. The Advisory Memorandum is "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack."[24]

Third, the Advisory Memorandum is, as its title makes clear, only advisory. It states expressly that it is intended only for *internal* guidance: "to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in [this case.]" 50a. Indeed, only staff "outside the Second Circuit" are "instructed to continue to apply the exemption" to employees of third parties. 50a. This limitation on the intended effect of the Advisory Memorandum is consistent with DOL policy which provides: "advisory interpretations announced by the Administrator [this one was announced by the Deputy Administrator] serve only to indicate the construction of the law

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[24] It appears that even the vehicle of an advisory memorandum was invented to serve strategic interests in this case. The DOL ordinarily opines on the application of the Act or its regulations through Wage and Hour Opinion Letters. The fact that the DOL rarely issues advisory memoranda is evidenced by the fact that this was the first one issued in 2005 even though it was issued on December 1. Moreover, a LEXIS search of all federal court decision reveals only one decision that mentions a DOL advisory memorandum, this Court's remand order in this case.

which will guide the Administrator in the performance of his administrative duties." 29 C.F.R. § 775.1.

The Second Circuit expressly and correctly followed this Court's decision in *Mead* in according the third-party employment regulation only that deference required by *Skidmore*.

B. The Court of Appeals' Decision is Consistent with This Court's Decision in Skidmore

Petitioners argue that the Second Circuit "refus[ed] to accord even *Skidmore* deference." Pet. at 23. But the Court of Appeals granted the regulation the deference it was due under *Skidmore*, *see* 28a-29a, and nevertheless correctly found it unpersuasive. *See* 29a-32a.[25]

In considering whether to follow DOL's interpretive, third-party regulation, the Second Circuit properly considered its "power to persuade" based on its consistency with the Act's text, its "consisten[cy] with the congressional purpose" expressed in the legislative history, its consistency with other regulations, the "consistency of the agency's position" over time, the "thoroughness evident in its consideration," and "the validity of its reasoning." *Skidmore*, 323 U.S. at 140; *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). Each factor suggests the Second Circuit correctly decided not to follow the regulation.

1. *The Regulation is Inconsistent with the Act's Text*

The FLSA does not exempt employees employed "to provide companionship services" to the elderly or infirm. Rather, it exempts only employees *"employed in domestic service employment* to provide companionship services" to

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[25] Petitioners, therefore, actually disagree merely with the Second Circuit's application of *Skidmore* which is not grounds for review under this Court's Rule 10.

the aged or infirm. 29 U.S.C. § 213(a)(15) (emphasis added). The third-party employer regulation renders the phrase "employed in domestic service employment" wholly superfluous. Congress did not intend the phrase to be meaningless. Rather, it intended it to have its ordinary meaning - employed in a household by the household. The regulation is thus inconsistent with the text of the Act.

2. *Congress Did Not Intend to Exclude Companions Employed by Third Parties*

The overall purpose of the amendments and their legislative history both demonstrate that Congress did not intend to exempt third-party employers from the minimum standards of the FLSA, allowing them, for example, to pay their employees less than the minimum wage so long as the employees provide companionship services.

Congress intended the term "domestic service employment" to encompass only employment within a home by the homeowner. The Senate Report explained that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of a person by whom he or she is employed." *2 Legislative History of the Fair Labor Standards Amendments of 1974* 1524 (1976) (S. REP. NO. 93-690, 93rd Cong., 2d Sess. 20 (1976)) (hereinafter *Legislative History). See also 2 Legislative History* 2144 (H.R. REP. NO. 93-913, 93rd Cong., 2d Sess. 35 (1974)).

Only domestics employed in the home by the home owner were even at issue when Congress adopted the exemption. The FLSA had not previously extended to such domestics employed by individuals and families because there was doubt whether they engaged in interstate commerce. Thus, the amendments expressly find that domestic service employment affects commerce. Pub.Law 93-259, §7, 88 Stat. 62 (1974)

(codified at 29 U.S.C. § 202(a)).[26] There was no such question concerning domestics employed by agencies. The pre-1974 Act already covered them. *See* 39 Fed. Reg. 35385 (Oct. 1, 1974) (DOL finding that "[employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . . [were] subject to the Act prior to the 1974 amendments.") The amendments extended coverage to domestics employed by those in whose homes they worked except if *those* domestics work as babysitters or companions. Obviously, Congress did not intend the exception to extending coverage to be broader than the extension itself.[27]

This was exactly the reasoning of the DOL when it considered the matter in the very wake of the amendments in the fall of 1974. On October 1, 1974, the DOL published a proposed interpretive regulation in the Federal Register providing, "Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such

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[26] That Congress' exclusive focus was extending the Act's coverage to domestics employed by individuals is made clear by the objection frequently expressed during floor debates that such an extension would impose an intolerable burden on "housewives." *See, e.g.*, 1 *Legislative History* at 250, 281, 727, 952, 954 (1976) (119 Cong. Rec. 18155 (June 5, 1973), 18341 (June 6, 1973), 24365 (July 17, 1973), 24797 (July 19, 1973), 24798 (July 19, 1973)) ("putting on the private individual the onus"); *2 Legislative History* 1676, 1815 (120 Cong. Rec. 4708 (Feb. 28, 1974), 5275 (Mar. 5, 1974)) ("adding additional record-keeping and other chores for the American housewife"). Echoing this theme, the Secretary of Labor's statement of opposition to the amendments made clear that he understood "domestic service" to mean "[a] household who hires a maid." *2 Legislative History* 1814 (120 Cong. Rec. 5275 (Mar. 5, 1974)).

[27] This would be true even accepting Petitioners' enterprise argument, discussed *infra* at 27-28, as previously covered companions employed by an enterprise engaged in commerce would have been rendered exempt by the exception to the extension of coverage.

services, are not exempt under section 13(a)(15) of the Act." 39 Fed. Reg. 35385 (Oct. 1, 1974). The DOL reasoned, "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Id.*[28]

The notice of final rule making replaced the proposed regulation with its opposite - the current regulation. 40 Fed. Reg. 7404 (Feb. 20, 1975). The DOL noted the change, but provided an explanation inconsistent with the text of the Act: "On further consideration, I have concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. 7404 (Feb. 20, 1975). This explanation is flawed because it does not accurately reflect the terms of the exemption. The exemption does not apply to "any employee engaged in companionship services" as the DOL suggested, but only to "employees *employed in domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added). By leaving out the critical limiting terms, the DOL improperly broadened the scope of the exception to the extension of the Act's coverage beyond the scope of the extension itself.

Congress believed it could avoid adding burdens on individuals and families *(see supra* at 22 n. 26) who employ babysitters and companions without compromising the amendments' goals because, as the Committee Reports explain, Congress did not expect employees in those categories

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[28] When the DOL proposed amending this regulation in 2001, it again explained, "The Department believes that Congress did not intend the 1974 amendments to change the status of workers already covered by the FLSA, but only intended to exclude casual babysitters and companions from those newly covered by the law, that is, those exclusively employed by the homeowner or family member." 66 Fed. Reg. 5485 (Jan. 19, 2001).

to be "regular bread-winners or responsible for their families support." *2 Legislative History* 2144 (H.R. Rep. at 36). *See also 2 Legislative History* 1524 (S. Rep. at 20). Yet workers employed by third parties often are assigned to multiple households and work on a full-time, permanent basis. Unlike the employees employed by families who Congress intended to exempt, employees of third-parties are likely to be "regular bread-winners."

Petitioners assert that the purpose of the companionship exemption was to enable those in need of such services to purchase them at a price they can afford and that such a purpose is served by application of the exemption to employees of third parties. But Petitioners cite nothing in the legislative history suggesting such a purpose,[29] only the District Court's decision and *Welding,* neither of which provide any support for the assertion.

Not only is there no support in the legislative history for the proposition that the exemption was adopted to hold down the cost of services, the exemption is ill suited to this imagined purpose. It is not limited to companionship services provided to indigent elderly or infirm persons. Moreover, it also encompasses babysitting. Surely, most people who employ babysitters, and many elderly and infirm persons in need of companionship services, were and remain fully able to meet the minimal requirements of the FLSA.[30]

Congress did not intend to exempt companions employed by third parties.

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[29] The DOL's Advisory Memorandum cites three, isolated statements during the floor debates, 52a, but close analysis reveals that none of the statements suggests such a purpose even on the part of the individual speakers much less Congress as a whole.

[30] Moreover, today, the elderly and disabled who need but cannot afford companionship services are assisted by all levels of government. *See* 66 Fed. Reg. 5481, 5483 (Jan. 19, 2001).

3. *The Interpretive Regulation is Directly Contrary to A Substantive Regulation*

The interpretive, third-party employer regulation is directly contrary to a substantive regulation also promulgated by the DOL. The Department's definition of "domestic service employment," as that term is "used in section 13(a)(15), . . . "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed."* 29 C.F.R. § 552.3 (emphasis added). Employees providing companionship services are exempt only if they are "employed in domestic service employment." *See* 29 U.S.C. § 213(a)(15) ("any employee employed in domestic service employment to provide companionship services"). Thus, under the DOL's own definition of "domestic service employment," companionship services must be performed for "the person by whom [the provider of such services] is employed" or the exemption is inapplicable. As the Second Circuit correctly found, there is thus a "stark internal inconsistency" between the regulation providing that companions may be employed by third parties and still be exempt and the definition of "domestic service employment," in which companions must be engaged in order to be exempt. 30a.[31] Moreover, the DOL classified the former as an interpretation and the latter as a general regulation having the force of law.

Petitioners argue that the Second Circuit should have deferred to the DOL's construction of § 552.3 in the hastily promulgated Advisory Memorandum, which attempts to reconcile §§ 552.3 and 552.109(a). But the Second Circuit correctly held that deference is inappropriate because § 552 3

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[31] In the proposed revisions of these regulations discussed *infra* at 26-27, the DOL agreed that "the current regulations contain an internal inconsistency" for this reason. 66 Fed. Reg. 5485 (Jan. 19, 2001).

is unambiguous in the relevant respect, citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). 5a. The Memorandum suggests that the phrase "performed by an employee in or about the private home (permanent or temporary) of the person by whom he or she is employed" was intended to mean "performed by an employee in or about a private home." 57a. This reading simply deletes the final ten words of the regulation and is obviously impermissible. Paradoxically, the Memorandum (like the Petitioners) relies on the maxim that courts must read regulations to "harmonize the various parts and provisions of the entire regulation and give them effect, if possible." 56a. However, DOL does not credit this maxim as it applies to the Act itself because the reading of § 552.3 proposed in the Memorandum renders the words "employed in domestic service employment" in the statutory exemption meaningless. In fact, the Memorandum's construction of the two regulations avoids the conflict between them only be rendering the last phrase in § 552.3—"by whom he or she is employed"—entirely superfluous.

Petitioners argue § 552.3 is ambiguous precisely because it is at odds with § 552.109(a). But the conflicting words in the regulations do not render them ambiguous. Thus, the Advisory Memorandum did not construe § 552.3's language to reconcile the regulations, but impermissibly suggested ignoring it. The Second Circuit rightly declined to defer to that suggestion.

4. *DOL has Twice Persuasively Explained Why Companions Employed by Third Parties Are Not Exempt*

As explained *supra* at 22-23, when DOL first proposed the regulations in 1974, it proposed an interpretive regulation denying exemption to companions employed by third parties, persuasively showing why this complied with Congress' intent. In 2001, DOL proposed a revision of the third-party employer regulation to deny exemption to companions employed by

third parties and again persuasively explained why the current regulation conflicts with Congress' intent. 66 Fed. Reg. 5485, 5488 (Jan. 19, 2001). In neither case did DOL adequately justify not adopting the proposed regulation as final.[32]

5. *The Regulation is Inconsistent with the Parallel Babysitter Regulation*

DOL regulations provide that babysitters employed by third parties are not covered by the § 213(a)(15) exemption. 29 C.F.R. § 552.109(b). Yet the Act pairs "babysitting services" and "companionship services" and the two were talked about in the same breath in Congress. In fact, companionship services were defined by reference to babysitting.[33] There is no basis for treating companions employed by third parties differently than babysitters so employed. Thus, the DOL's regulation are internally inconsistent on this point as well.

6. *The Second Circuit's Decision Will Not Create a Gap in Coverage of Domestic Service Employees*

Petitioners argue that accepting DOL's own definition of "domestic service employment" in § 552.3 would limit the

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[32] The faulty explanation for the rejection of the original proposed regulation is discussed *supra* at 23. The 2001 proposal was withdrawn in 2002, *see* 67 Fed. Reg. 16668 (Apr. 8, 2002), but, as the Second Circuit explained, on grounds "that have no bearing on the . . . relevant question of what Congress intended in 1974." 28a.

[33] During Senate floor debate, Senator Williams, Labor Subcommittee Chair, explained "companion" by referring to "babysitters":

> I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters. "Companion," as we mean it, is in the same role—to be there and to watch an older person, in a sense.

1 *Legislative History* 963 (119 Cong. Rec. 24801 (July 19, 1973)). After this explanation, another senator interjected, "In other words, an elder sitter," and Senator Williams replied, "Exactly." *Id.*

sweep of the 1974 extension of the Act's coverage to domestic employees by excluding domestics employed by third-parties too small to qualify for enterprise coverage under 29 U.S.C. § 203(s). This argument has no foundation in the legislative or regulatory history. Nothing suggests Congress considered the status of workers employed by such small employers as grounds for adopting a broad exemption. DOL did not state this rationale when it adopted § 552.109(a) in 1974 or decided not to revise it in 1991.

Moreover, accepting the definition contained in § 552.3 and rejecting § 552.109(a) would have no such effect because the definition of "domestic service employment" contained in § 552.3 defines the term only "[a]s used in section 13(a)(15) of the Act" (indeed, the term only appears in § 13(a)(15) as the language inserted into §§ 6 and 7 by the 1974 amendments to extend coverage to domestic servants is different, *see* 29 U.S.C.§§ 206(f)(1), 207(1)). Thus, accepting the § 552.3 definition for purposes of the application of the exemption avoids the perverse effect that would be caused by applying the limitation on the extension of the Act's coverage to employees of the third-parties who were already covered by the Act prior to its extension, *see supra* at 21-23, and will not limit the sweep of the extension.

For all of these reasons, the Second Circuit correctly held that the regulation is unpersuasive under *Skidmore*.

C. Petitioners Fail to Demonstrate that the Outcome Will Be Different If Chevron Deference Is Accorded

If this Court were to grant review and hold that the regulation is not interpretive, then it would have to remand to the Second Circuit for a determination of whether the regulation is nevertheless invalid because it was not promulgated in compliance with the APA's notice and comment requirements. 5 U.S.C. § 553(b). The Second Circuit would

be bound by its own precedent to hold the regulation invalid for this reason.[34]

As explained *supra* at 22-23, the notice of proposed rule making that led to the third-party employer regulation informed the public that employees of third parties were *not* exempt, *see* 39 Fed. Reg. 35385 (Oct. 1, 1974), but the final regulation provided exactly the opposite. *See* 40 Fed. Reg. 7404 (Feb. 20, 1975). This did not satisfy the APA under Second Circuit precedent.

The Second Circuit has held that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (quoting *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C.Cir. 1985)). This was clearly the case here, where the final regulation was the exact opposite of the proposed regulation. Indeed, this case is almost identical to *Black Media*. There, the FCC promulgated a notice of proposed rule making announcing it would include a minority preference policy in rules governing applications for broadcast licenses, but "then it declined to do so in its final report without providing a meaningful opportunity for comments as required by [the APA]." 791 F.2d at 1018. Here, the DOL announced that the exemption would not apply to employees of third parties, and then the DOL promulgated a final regulation providing that it would. For this reason, the Second Circuit found that the regulation was promulgated after "substandard notice and comment procedure." 25a. A legislative regulation promulgated without complying with the APA is invalid, *see, e.g., Black Media*, 791 F.2d at 1024.

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[34] In addition, even accorded *Chevron* deference, the regulation is inconsistent with the unambiguously expressed intent of Congress as explained *supra* at 20-21 and thus invalid.

Thus, if the regulation is legislative, it would be held invalid by the Second Circuit under the APA.

This Court ordinarily denies review when a reversal would not change the relative rights of the parties in any concrete fashion. Because the regulation will be held invalid even if it accorded *Chevron* deference, this Court should not grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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